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In the Supreme Court of the United States

October Term, 1978

No. 78-663

BOROUGH OF FOX CHAPEL,
WILLIAM A. JONES and KATHERINE P. JONES,
HAROLD H. HAMMER and HANNAH R. HAMMER,

Appellants

vs.

JOHN A. FRIDAY,

Respondent

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Jurisdictional Statement

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No.

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Jurisdictional Statement

OPINIONS BELOW

The following opinions and orders are printed in the Appendix to this statement:

1. Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, at S.A. 96 of 1976 dated September 9, 1976.

2. Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, at S.A. 96 of 1976 dated January 11, 1977, modifying the Order entered September 9, 1976.

3. Opinion and Order of the Commonwealth Court of Pennsylvania, at Nos. 158 and 303 C.D. 1977 dated January 9, 1978, 33 Pa. Commw. Ct. 256, 381 A.2d 504.

4. Order of the Supreme Court of Pennsylvania at No. 1514 Allocatur Docket dated July 21, 1978.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity, as applied in this case, of Act of June 1, 1972, P.L. 333, No. 93, §1011, PA STAT. ANN. tit. 53, §11011 (Purdon), *infra.*, p. 3, on the grounds that it is repugnant to the Constitution of the United States.

Respondent sought a building permit to construct a 181-unit apartment building on his property zoned for single family residential structures, and sought a declaration that appellant Fox Chapel's zoning ordinance was unconstitutional because it zoned no portion of the municipality for such structures. The court of first instance declared appellant Fox Chapel's zoning ordinance unconstitutional for that reason. The Zoning Officer of the appellant, Borough of Fox Chapel, was thereafter ordered by the court of first instance to issue a building permit to the respondent. On appeal, the Commonwealth Court of Pennsylvania on January 9, 1978, affirmed the lower court's order, holding that said order was sanctioned by PA. STAT. ANN. tit. 53, §11011 (Purdon). Appellants petitioned the Supreme Court of Pennsylvania for Allowance of Appeal from Commonwealth Court of Pennsylvania; however, appellants' petition was denied without opinion on July 21, 1978. Timely notice of appeal to this court was filed in the Commonwealth Court of Pennsylvania on September 25, 1978. As the Commonwealth Court of Pennsylvania explicitly rejected appellant's challenge to PA. STAT. ANN. tit. 53, §11011 (Purdon), this matter is appropriately brought to this Court by appeal. *Cohen v. California*, 403 U.S. 13 (1971); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

ADDITIONAL GROUNDS OF JURISDICTION

The appellants also contend that the judgment below is founded on other erroneous interpretations of the United States Constitution which involve questions not subject to review by this Court on appeal. In particular, the courts of Pennsylvania have misconstrued the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. These errors are included in the statement of the questions presented by the appeal, hereinafter set forth. If these were the only errors complained of, the appellants would be limited to a petition for writ of certiorari under 28 U.S.C. §1257(3). They are included in this appeal under the authority of *Prudential Insurance Co. v. Check*, 259 U.S. 530, 547 (1922), and *Flournoy v. Weiner*, 321 U.S. 253, 263 (1944).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Tenth, and Fourteenth Amendments to the Constitution of the United States.

This case also involves Act of June 1, 1972, P.L. 333, No. 93, §1011, PA. STAT. ANN. tit. 53, §11011 (Purdon) which states:

> (1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and to set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.
>
> (2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a develop-

ment or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(3) The fact that the plans and other materials referred to in subsection (1) are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (2) and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

QUESTIONS PRESENTED

1. Whether the remedy ordered by the courts below pursuant to PA. STAT. ANN. tit. 53, §11011 (Purdon) is a judicial usurpation repugnant to the Constitution of the United States of the legislature's portion of the "police power."

2. Whether the courts of Pennsylvania in construing the Fifth and Fourteenth Amendments to the Constitution have erroneously restricted and held unconstitutional the legitimate exercise of the "police power" by a local municipality.

STATEMENT OF THE CASE

The Borough of Fox Chapel is located in northeastern Allegheny County, approximately twelve miles from Pittsburgh's Golden Triangle. The terrain in Fox Chapel Borough is hilly, made up of slopes, valleys and streams. The Borough's unique character, and its attractiveness to residents and prospective residents, stem from its natural rural character, typified by a watershed contained within the Borough, winding roads following the contours of the land, wooded areas, open space (called "parkways") along major roads, and low population density. As a green space, the Borough is an environmental asset to Allegheny County. Wildlife and vegitation are protected in the Borough's 190-acre park system. These characteristics of the Borough and similar areas enhance the ability of the Pittsburgh area to attract industry and high quality professionals who serve industry so that the residential and environmental quality of Fox Chapel Borough is beneficial to the total economy of the Pittsburgh area.

Fox Chapel's present zoning is based upon the 1963 Comprehensive Plan prepared by the Pittsburgh Regional Planning Association. The Plan recommended the protection and continuation of the Borough's unique quality resulting from its spacious character of development. These recommendations are reflected in Ordinance No. 319, enacted in 1971, which states the following objectives:

(1) To preserve the character of Fox Chapel as a spacious, suburban, residential community.

(2) To preserve land areas of particular scenic, geological or botanical interest as permanent open space.

(3) To minimize pollution of the environment by objectional noise, vibrations, smoke, fumes, odors, harsh lights, solid wastes and liquid borne effluents.

(4) To assure that all residential construction meets adequate standards with respect to light, air, fire protection, and other desirable qualities to ensure a safe, wholesome residential environment for every resident of Fox Chapel.

(5) To assure that institutions in the Borough provide sufficient off-street parking space to render on-street parking normally unnecessary.

(6) To create a safe, free-flowing traffic circulation pattern.

(7) To assure that all development promotes fire safety by employing safe practices and by providing adequate site accessibility to fire equipment.

On March 25, 1974, John A. Friday, Jr., filed an application asking the Fox Chapel Borough Zoning Hearing Board to hear his challenges to Fox Chapel's Zoning Ordinance. Mr. Friday challenged the failure of the Ordinance to provide for multi-family dwellings and the inclusion of his 23 acre tract in the Class A Residence District, providing for single family dwellings. As last amended, Mr. Friday's application proposed a five-story building containing 181 "luxury" apartments with floor areas approximating 1,500 square feet per unit.

Fox Chapel Borough's Zoning Hearing Board began to hear testimony on December 12, 1974, after a three judge panel denied a request by Mr. and Mrs. Harold Hammer and others that the Fox Chapel Zoning Board be enjoined from conducting any proceedings concerning the Friday application. The Hammers and their co-plaintiffs argued, *inter alia*, that PA. STAT. ANN. tit. 53, §11011 (Purdon) was unconstitutional because it required the courts to sit as super zoning boards, but the merits of this argument were not reached since the panel held that the plaintiffs failed to show "irreparable injury" in the absence of judicial intervention. *Neimann v. Hewitt*, 387 F.Supp. 926 (W.D.Pa. 1974). Twenty-four sessions of the Zoning Hearing Board were held to consider the Friday applications, and the testimony concluded on November 5, 1975. The Zoning Hearing Board found that the structure proposed by Mr. Friday would be incompatible with existing single family use and totally out of character with the Borough of Fox Chapel from the points of view of aesthetics, density, environment and planning. In addition to these concerns, the Zoning Hearing Board noted the following:

1. The Borough's roads, and in particular Fairview Road upon which the Friday property fronts, were not adequate to handle the kind of traffic generated by high-rise apartments.

2. Fox Chapel's volunteer firemen have no equipment which would be adequate to rescue residents from upper floors of a multi-story apartment building.

3. The Friday tract contains soft impermeable soil which presents a great risk of landslide. This risk would be reduced by development of the site in single-family dwellings.

4. The sewage treatment facilities proposed by Mr. Friday fail to meet either local or state standards.

On January 16, 1976, Mr. Friday took an appeal from the decision of the Fox Chapel Zoning Hearing Board to the Court of Common Pleas of Allegheny County. Permission to intervene as appellees was granted to Mr. and Mrs. William A. Jones and Mr. and Mrs. Hammer in July, 1976, and to the Borough of Fox Chapel on September 2, 1976.

The Court of Common Pleas decided the matter on the record made before the Zoning Hearing Board and the

briefs submitted by the parties. On September 9, 1976, Judge Watson, speaking for the Court, found the Borough of Fox Chapel's Zoning Ordinance of 1971 "unconstitutional to the extent that it prohibits apartment building construction in the Borough of Fox Chapel" (p. 11a), and ordered the Borough of Fox Chapel to "take immediate steps to revise its zoning ordinances to provide for apartment buildings" *(id)*.

Petitions to modify the Court's Opinion and Order were filed by all parties. In an Opinion and Order entered January 11, 1977, Judge Watson vacated his order directing the Borough of Fox Chapel to amend its Zoning Ordinance, but ordered "the Zoning Officer of the Borough of Fox Chapel [to] issue a building permit to [Mr. Friday]" (p. 14a).

The appellant herein appealed to the Commonwealth Court of Pennsylvania which filed an Opinion and Order on January 9, 1978, affirming "the order of the Court of Common Pleas of Allegheny County made September 9, 1976, as modified by its order of January 11, 1977" (p. 20a).

Appellants, thereafter, petitioned the Supreme Court of Pennsylvania for Allowance of Appeal, but the Petition was denied without opinion on July 21, 1978.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal to the Commonwealth Court of Pennsylvania from Judge Watson's modified opinion, the appellants set forth, *inter alia*, the following positions:

II. *Fox Chapel Borough's zoning ordinance is valid under the decisions of the Supreme Court of the United States.*

III. *The requirement by the Court below that Fox Chapel Borough issue a building permit violates the Constitution of the United States.*

Appellants argued that the Pennsylvania decisions holding zoning ordinances similar to Fox Chapel's "unconstitutional" were based on the erroneous premise that the police power as circumscribed by the Fifth and Fourteenth Amendments does not extend to the preservation of beauty, spaciousness, aesthetics, and other spiritual values. Furthermore, it was argued if the ordinance were invalid, the order of the lower court compelling the Borough to issue a permit without a determination of site suitability was an improper usurpation of the Borough's legislative discretion. Since Judge Watson held PA. STAT. ANN. tit. 53, §11011 (Purdon) required such a remedy, appellants attacked the validity of the statute.

These contentions of the appellants were rejected in the opinion of the Commonwealth Court. After first holding that the total exclusion of apartments rebutted the ordinance's presumption of validity, the Court continued:

> The Borough says that it carried its burden of justifying its exclusion of apartment use by showing that apartments would cause an increase in population which would in turn place a strain on municipal services, cause congestion of its roads and do harm to the aesthetic nature of the Borough. Similar justifications were specifically rejected in *Girsh Appeal, supra*.

In the final paragraph, the Court said:

> Finally, we find no merit in the Borough's contention that the court below improperly usurped the Borough's legislative discretion by ordering that a building permit be issued to Friday. Section 1011 of the MPC, [PA. STAT. ANN. tit. 53, §11011 (Purdon),] authorizes courts to give just such relief upon a successful challenge of a regulation.

These arguments were also presented in appellants' Petition for Allowance of Appeal from Commonwealth Court of Pennsylvania which was filed with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania, however, denied the petition without opinion.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Lower Court's Order Affirmed on Appeal Compelling the Zoning Officer of the Borough of Fox Chapel to Issue a Building Permit to the Respondent is a Usurpation of the Legislative Portion of the "Police Power" Sanctioned by PA. STAT. ANN. tit. 53, §11011 (Purdon), but Repugnant to the Constitution of the United States.

Appellants submit that the police power is simply the will of the majority which is exercisable through their elected representatives and limited only by the rights of individuals and minorities as embodied in the Fifth and Fourteenth Amendment concepts of Due Process and Equal Protection. The role of the judiciary in the administration of the police power is limited to the determination of whether a particular legislative act interferes with those rights. See *Berman v. Parker, infra.*

In the original opinion filed in this case on September 9, 1976, Judge Watson directed Fox Chapel Borough to revise its zoning ordinance (p. 11a). In that opinion, he scrupulously avoided making the legislative determination of whether or not the Friday tract was an appropriate site for an apartment building. Subsequently convinced that he lacked the power to compel Fox Chapel Borough to amend its zoning ordinance, Judge Watson directed the issuance of a building permit (p. 14a). By ordering the issuance of a building permit, the Court has in effect amended the zoning ordinance of the Borough of Fox Chapel so as to allow multi-

family residences on the Friday tract. For the reasons set forth below, appellants submit that this *de facto* amendment of the zoning ordinance is contrary to the United States Constitution.

We are concerned here with the zoning question of who may determine the uses to which a given parcel of land may be put. When confronted for the first time with review of a zoning ordinance, in *Euclid v. Ambler Co.*, 272 U.S. 359, 387 (1926), this Court stated:

> The ordinance now under review and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.

Therefore, in this case, the responsibility of the different branches of government in the exercise of what is commonly known as the "police power" must be determined.

The police power has been "reserved to the States, for there is in the Constitution no grant thereof to Congress." *Keller v. United States*, 213 U.S. 138, 144 (1909). The question of who may exercise the police power has been answered most succinctly by the Supreme Court of California in *Frost v. Los Angeles*, 181 Cal. 22, 183 Pac. 342 (1919):

> The legislature is possessed of the entire police power of the state, except as its power is limited by provisions of the Constitution.

However, it is well settled that a State may delegate to municipal legislative bodies the discretion to enact local ordinances which are supportable by the police power. *Zucht v. King*, 260 U.S. 174, 176 (1922). The Pennsylvania legislature did this in the Act of July 31, 1968, P.L. 805 Art. I, §601, PA. STAT. ANN. tit. 53, §10601 (Purdon) which provides:

> The governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.

Furthermore, the legislature listed among the "purposes" for which zoning should be enacted the promotion of "proper density of population" and prevention of "overcrowding of land." Act of July 31, 1968, P.L. 805, Art. VI, §604, PA. STAT. ANN. tit 53, §10604 (Purdon).

In *Berman v. Parker*, 348 U.S. 26, 32 (1954), this Court commented on the different roles performed by the legislature and the judiciary in the promulgation of laws dependent upon the police power.

> The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Therefore, once the court had determined that Fox Chapel Borough had failed to exercise the police power for a public purpose, its function in the administration of the police power was completed. The Pennsylvania statute which, in effect, allowed the court to exercise its discretion in determining that a particular parcel was suitable for a particular use is contrary to the rationale of cases barring State legislatures from contracting away their right to exercise the police power wherein this Court has said:

> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. . . . [T]hey are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877).

Texas & N.O.R.R. Co. v. Miller, 221 U.S. 408 (1911).

The Pennsylvania legislature's *delegation* of the discretion embodied in the police power to another branch of government is at least as offensive to the scheme of government contemplated by the United States Constitution as is the *contracting* away of the police power discretion.

The Pennsylvania courts have not been blind to the improper delegation of responsibility provided for in the statute in question. In *Ellick v. Board of Supervisors of Worcester Township*, 17 Pa. Commw. Ct. 404, 414, 333 A.2d 239, 246 (1975), the Commonwealth Court made the following comments when confronted with a local ordinance which did not allow the construction of townhouses within the township's borders.

> A reading of section 1011 of the MPC, [PA. STAT. ANN. tit. 53, §11011 (Purdon)], permits one to conclude that the Legislature, through the 1972 amendments, has imposed upon the courts of common pleas broad and burdensome duties and authority. In effect, the Legislature has directed those courts to act as administrative bodies (as super zoning boards of adjustment) which the appellate courts in this Commonwealth have stated many times is not a proper judicial function.[5] We

[5]The traditional view has been that the responsibility for zoning rests with the municipality involved rather than the courts, and that therefore courts should not act as super zoning boards of adjustment or master planners of the last resort. (Cites omitted.)

> believe that social and economic problems of society presented in zoning cases should properly be resolved by the legislative and executive branches of government rather than by the courts. Courts are intended to decide cases on the facts and the law presented, and were never intended to dictate legislative matters (e.g. reasonable side-yard dimensions) as may be involved in challenging landowners' plans. Nonetheless we may not disregard the intent of the Legislature which is expressed in the MPC.

In the present case the Commonwealth Court acknowledged that "[s]ite suitability is an appropriate consideration going to the type of relief" (p. 19a), but approved the lower court's order which failed to consider the same. Thus, the Borough of Fox Chapel and its citizens have been denied the right to have legislators elected by the majority exercise the police power, a power reserved to the people by the Tenth Amendment, and limited only by other Constitutional considerations.

In summary, since zoning is an exercise of the police power and because the police power must be exercised through a legislative body, it logically follows that a change in zoning can only be effected by the appropriate legislative assembly having jurisdiction of the particular property. The present order rezones a tract of land in Fox Chapel Borough without any opportunity for the Borough's legislators to consider the suitability of the site. Upon a finding of abuse of the police power by the legislative branch, a constitutionally permissible remedy would be for a court to retain jurisdiction (as is already provided for in PA. STAT. ANN. tit. 53, §11011 (Purdon)) and require the legislative body to correct any deficiency in the ordinance. The remedy would be similar to court orders in desegregation cases and election redistricting cases. An order which only requires compliance by the respondent with valid building controls in effect on the date of respondent's original application for a building permit (p. 14a) unfairly denies the Borough of Fox Chapel's right to promulgate building controls, for the controls in effect at the date of original application were not promulgated with the expectation that said controls would govern the erection of multi-family dwellings.

II. The Courts of Pennsylvania Held the Zoning Ordinance of Fox Chapel Borough Unconstitutional Because of an Erroneous Interpretation of the Fifth and Fourteenth Amendments of the United States Constitution.

The order of the Court of Common Pleas which appellants have heretofore disputed as being repugnant to the Constitution of the United States was predicated upon the same court's holding that "Fox Chapel Borough's Ordinance No. 319 is unconstitutional to the extent that it provides for only single family dwellings and not for apartment buildings" (p. 9a-10a). On appeal, the Commonwealth Court accepted the lower court's holding that "the Zoning Ordinance was exclusionary and therefore unconstitutional" (16a-17a). Neither opinion makes any reference to the United States Constitution or the Pennsylvania Constitution, much less any specific section of either constitution. Both courts relied primarily upon the decision of the Supreme Court of Pennsylvania in *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), to arrive at their determinations that Fox Chapel Borough's zoning ordinance was unconstitutional.

The facts of *Girsh* are strikingly similar to those of the present case. In *Girsh*, the Supreme Court of Pennsylvania reviewed the zoning ordinance of Nether Providence Township which did not expressly provide for the construction of multi-unit apartment buildings anywhere within the borders of the township. The Court concluded that a zoning scheme that makes no reasonable provision for apartment uses could not be "constitutionaliy" sustained. The only reference to either the United States or Pennsylvania Constitutions is found in footnote 3 wherein the Court said:

> We must start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. Amends. V, XIV. Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926), it goes without saying that the use of the police power cannot be unreasonable. E.g., *Eller v. Board of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964).

Fortunately, further clarification of the basis for the *Girsh* decision is found in *Surrick v. Zoning Hearing Board of the Township of Upper Providence*, ____ Pa. ____, 382 A.2d 105 (1977). The dispositive issue in *Surrick* was again "whether the township ordinance unconstitutionally exclude[d] multi-family dwellings". 382 A.2d 106. Before examining the facts of the *Surrick* case, the Supreme Court of Pennsylvania stated:

> Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, XIV; Pa. Const. art. 1, §1; *Girsh Appeal*, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. *National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965), *citing, inter alia, Glorioso Appeal*, 413 Pa. 194, 196 A.2d 668 (1964). Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare. See *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *Girsh Appeal, supra.*

This Court recently reminded the States that "a State may not impose such greater restrictions [on police activity] as a matter of *federal constitutional law* when this Court specificaly refrains from imposing them". *Oregon v. Hass*, 420 U.S. 714, 719 (1975). This Court was confronted with a state court's interpretation of the breadth of protection provided by the self-incrimination clause of the federal Constitution in *Oregon v. Hass*, but the same concept forbids the Pennsylvania courts from placing greater restrictions as a matter of federal constitutional law on the use of the police power than are mandated by the decisions of this Court. In reliance upon the Fifth and Fourteenth Amendments to the United States Constitution, the courts of Pennsylvania in *Girsh* and its progeny, including the case herein appealed, have placed upon the exercise of the police power by legislative bodies far greater restrictions than are required by this Court's statements of federal constitutional law.

Initially, it is not clear that the Pennsylvania Supreme Court is applying the correct test of substantive due process. In *Surrick*, the Court said that a zoning ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. The very same test was applied by this Court in determining the constitutionality of the concept of zoning in *Euclid v. Ambler Co., supra*, at 395. However, this Court's view of the proper scope of judicial review of economic and social legislation has changed drastically since *Euclid* was decided in 1926. If *Euclid* were to be decided today on substantive due process grounds this Court would, in all probability, apply a "minimal rationality" test as it did in *Kelley v. Johnson*, 425 U.S. 238, 247-248 (1976), wherein a police officer complained that a local regu-

lation limiting the length of policemen's hair violated his rights under the Fourteenth Amendment which this Court noted "protects substantive aspects of liberty against unconstitutional restrictions by the State". *Id.* at 244. This Court's predilection towards applying a "minimal rationality" test to a zoning ordinance is evidenced by its decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) where this Court noted:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable, not arbitrary'" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears a "rational relationship to a [permissible] state objective". *Reed v. Reed*, 404 U.S. 71, 76.

Absent the involvement of a suspect classification or a fundamental right which requires the application of a strict scrutiny test, it appears that this Court presently applies substantially the same test in Fourteenth Amendment cases whether the Due Process or the Equal Protection Clause is involved.

Regardless of whether a "substantial" or a "rational" relationship is required, said relationship must be to the health, safety, morals, or general welfare of the community. The Pennsylvania courts provided appellants the opportunity to establish the requisite relationship, but in assessing the evidence offered to support the constitutionality of the ordinance under attack, the state courts committed an error of constitutional magnitude.

The trial court noted that the findings made by the Zoning Hearing Board contained objections which "were general attacks on the apartment building as not fitting into the aesthetic setting of Fox Chapel" (p. 9a). Judge Watson dismissed these findings based on the Pennsylvania Supreme Court's statement in *Medinger Appeal*, 377 Pa. 217, 226, 104 A.2d 118, 122 (1954), that "neither aesthetic reasons nor conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners".

At the appellate level, the Commonwealth Court noted that one reason given by the Borough to justify the exclusion of apartments was potential "harm to the aesthetic nature of the Borough" (p. 18a). The Court's only comment on that justification was that a similar argument had been specifically rejected in *Girsh*. The Court was correct in its holding to the extent that the Pennsylvania Supreme Court in *Girsh* did affirm its prior position that "protecting the character — really the aesthetic nature — of the municipality is not sufficient justification for an exclusionary zoning technique". *Girsh Appeal, supra*, at 244. "Exclusionary" as defined by the Pennsylvania appellate courts refers to the exclusion of a particular use from a municipality rather than an exclusion of any group or class, discrimination against whom is constitutionally proscribed. See *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967); *Girsh Appeal, supra*.

The holdings of the Pennsylvania courts on the question of whether the Fifth and Fourteenth Amendments allow the police power to be exercised to preserve the aesthetic qualities of a community are the exact opposite of this Court's statements on the subject. In *Berman v. Parker, supra*, the appellant challenged the District of Columbia Redevelopment Act of 1945 as being contrary to the Fifth Amendment's due process and eminent domain clauses. This Court said:

> The concept of the public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S.

> 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

If the Fifth Amendment allows the governing body of the District of Columbia to determine that their community should be beautiful, then obviously the Pennsylvania courts have erred in holding that the Fifth Amendment as applied to the States by the Fourteenth Amendment prohibits the governing body of Fox Chapel Borough from deciding that Fox Chapel Borough shall be beautiful and spacious.

Furthermore, this Court's view has not changed since the *Berman* case was decided in 1954. While reviewing a zoning ordinance challenged on equal protection grounds in *Village of Belle Terre v. Boraas*, *supra*, at 9, this Court again supported "aesthetic" zoning when it said:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissable one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and blessings of quiet seclusion and clean air make the area a sanctuary for people.

A comparison of *Berman* and *Belle Terre* to the Pennsylvania Court's refusal to accept aesthetic concerns as a proper

justification for the exercise of the police power in this case compels the conclusion that Pennsylvania has imposed greater restrictions on the police power as a matter of federal constitutional law than this Court imposed on the police power under similar circumstances. Therefore, this case merits review and reversal.

CONCLUSION

For the Foregoing Reasons, Probable Jurisdiction Should Be Noted.

Respectfully submitted,

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October 19, 1978

IN THE

Court of Common Pleas of Allegheny County, Pennsylvania

Civil Division

IN RE:	Application Of John A. Friday, Jr., Et Ux. Requesting Fox Chapel Borough Zoning Hearing Board To Hear Applicants' Challenges To The Fox Chapel Zoning Ordinance And Map And Make Findings Of Fact And Divisions Based Thereon.	**S.A. 96 of 1976**

OPINION

Watson, J.

This matter comes before the Court upon the Petition and Appeal of John A. Friday, Jr., from the decision of the Zoning Hearing Board of the Borough of Fox Chapel, Allegheny County.

The petitioner had applied to the Fox Chapel Borough officials for permission to construct an apartment building or multiple-family dwellings on a tract of land owned by the petitioner situated within the Borough of Fox Chapel. The building permits were denied. Following the refusal by the Borough to issue the building permit, the petitioner challenged the validity of the zoning ordinance cited by the Borough as grounds for the denial. The Zoning Ordinance of 1971 (Ordinance No. 319, Borough of Fox Chapel) permits, in relevant part, only one single family dwelling per lot in the Borough of Fox Chapel.

The Municipalities Planning Code in Sections 910 and 1004 (53 P.S. 10101, et seq.) provides the legislative authority for an aggrieved individual to challenge the constitutionality

of a zoning ordinance. The Fox Chapel Zoning Hearing Board heard the petitioner's appeal, and dismissed his constitutional objections. From the dismissal of his constitutional challenges to the ordinance the petitioner has appealed to this Court.

The Court has the burden of analyzing zoning ordinances for constitutional defects. It is important to note that a zoning ordinance is presumed to be valid and constitutional and anyone challenging an ordinance has a heavy burden of proving otherwise. In the present case Ordinance No. 319 authorizes only single family dwellings (with certain exceptions for churches, municipal buildings, fire house, post office and school—none of which are involved here). The petitioner has sought building permits to construct an apartment building. In cases where a municipality attempts to totally prohibit an otherwise lawful use of land through a zoning ordinance the Commonwealth Court has stated:

> "When an individual challenging a zoning ordinance provides [sic] a total prohibition of an otherwise lawful use, the burden shifts to the municipality to prove that such prohibition bears a relationship to the public health, safety, morals and general welfare. See *Beaver Gasoline Company, supra; Amerada Hess Corporation vs. Zoning Board of Adjustment*, 11 Pa. Comm. 115, 313 A.2d 787 (1973)."
>
> *Ellick vs. Board of Supervisors of Warchester [sic] Township*, 333 A.2d 239 (Pa. Comm. Ct. 1975)

The Pennsylvania Supreme Court has dealt with zoning ordinances which totally prohibit a legitimate use of land, such as apartment building construction in the *Girsh Appeal*, 437 Pa. 237 (1970). In *Girsh, supra*, Nether Providence Township was zoned approximately 75% for single family dwelling units. The petitioner-appellant requested building

permits for a high rise apartment building. The permits were denied by the Township Board of Commissioners. Appellant then challenged the constitutionality of the ordinance which did not explicitly prohibit multi-unit apartment buildings, but were not provided for in the ordinance, except by way of variance. The Zoning Board of Appeal upheld the constitutionality of the ordinance. An appeal was taken and the Supreme Court stated:

> "Just as we held in *Exton Quarries*[1], *Ammon R. Smith*[2], and *Norate*[3] that the governing bodies must make some provision for the use in question, we today follow those cases and hold that appellee cannot have a zoning scheme that makes no reasonable provision for apartment uses."
>
> [1. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43 (1967). Supreme Court struck down an ordinance which did not allow quarrying anywhere in the municipality.
>
> 2. *Ammon R. Smith Auto Co. Appeal*, 423 Pa. 493 (1966). Supreme Court struck down an ordinance which placed a total ban on flashing signs.
>
> 3. *Norate Corp. v. Zoning Board of Adjustment*, 417 Pa. 397 (1965). Supreme Court struck down an ordinance prohibiting billboards everywhere in the municipality.]

After a lengthy admonition of Nether Providence Township for attempting "to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring", the Supreme Court went further to state:

> "Thus, the suburbs, which at one time were merely 'bedrooms' for those who worked in the urban core, are now becoming active business areas in their own right

> . . . In light of this, Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels. Obviously, if every municipality took that view, population spread would be completely frustrated. Municipal services must be provided somewhere, and if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden. *Certainly it can protect its attractive character by requiring apartments to be built in accordance with (reasonable) set-back, open space, height, and other light-and-air requirements, but it cannot refuse to make any provision for apartment living.* The simple fact that someone is anxious to build apartments is strong indication that the location of this township is such that people are desirous of moving in, and we do not believe Nether Providence can close its doors to those people.
>
> It is not true that the logical results of our holding today is that a municipality must provide for all types of land use. *This case deals with the right of people to 'live on land'*, a very different problem than whether appellee must allow certain industrial uses within its borders. *Apartment living is a fact of life that communities like Nether Providence must learn to accept.*" (emphasis added)

The Pennsylvania Supreme Court is perfectly clear in its denunciation of zoning ordinances which totally prohibit certain types of activities. When a zoning ordinance attempts to prohibit apartment houses, or by practical effect to exclude them by making no provision therefor or authorization therefor, the Court is even more damning in its denunciation, since it deals with the rights of people to "live on land". This Court is not unmindful of Fox Chapel's desire to preserve the character of its community. But to totally exclude apartment buildings is unreasonable on its face. The municipality has the burden of demonstrating to the Court's satisfaction that its ordinance bears a relationship to the public health, safety, morals and general welfare.

II.

It is the position of this Court that the appellant has established that Ordinance No. 319 provides for exclusionary zoning, and its practical effect is to exclude apartment buildings from the borough. It was pointed out extensively above that our Supreme Court held a zoning ordinance which failed to provide for multi-family housing, in that case apartment structures, to be unconstitutional, *Girsh Appeal*, supra, *Appeal of FPA Corporation*, 360 A.2d 851 (Pa. Cmwlth, June 18, 1976). In *Camp Hill Development Co., Inc. v. Zoning Board of Adjustment of Dauphin*, 13 Pa. Cmwlth. 519 (1973), the court held that the *Girsh* principle applied equally to townhouses.

The burden has shifted to the municipality to prove that the prohibition of apartment houses bears a relationship to the public health, safety, morals and general welfare of the citizens of the municipality.

The borough of Fox Chapel, as intervenor, and the Zoning Hearing Board counsel have responded by alleging that:

1. The findings of fact and conclusions of law of the Zoning Hearing Board should not be disturbed by the Court;
2. The petitioner has not met his burden of proving that Ordinance No. 319 is unconstitutional;
3. The Ordinance No. 319 is not exclusionary;
4. The proposals of the applicants would adversely affect the health, safety and welfare of the residents of Fox Chapel and the community.

A.

The first point raised by the Borough is that the Zoning Hearing Board's findings of fact and conclusions of law should not be disturbed by the reviewing Court. It was argued that the applicant presented no affirmative testimony as to the need for the development the applicant sought, nor was there testimony presented that the applicant's proposed apartment buildings would cure the ill generally associated with exclusionary zoning, i.e. denial of housing to the poor and lower middle income groups, and minorities. It was further argued that Fox Chapel is part of a regional system with four other contiguous municipalities which, taken together, give a regional plan of development which encompass the multi-family dwelling units proposed by the applicants.

From the Court's reading of the *Girsh Appeal* the basis of the decision was not the denial of housing to the poor, disadvantaged or minorities. The basis of the case was to force municipalities to accept the fact of population spread, and not to permit a municipality to zone out the right of people to "live on land". This Court, of course, recognizes that a municipality has the right to set reasonable regulations to protect the attractive quality of the community and to require apartment houses to conform to reasonable height, space, light-and-air type requirements.

The Supreme Court in *Girsh* did not examine surrounding communities to determine if Nether Providence Township was part of a regional scheme of development. The Court looked to the zoning ordinance in effect in that community and made a decision on the constitutionality of that ordinance alone. Even if, by an historical accident, that Fox Chapel and the surrounding municipalities comprise an area which, taken as a whole, provides a reasonable development plan, the fact remains that there is a zoning ordinance in

existence which totally excludes apartment houses from one municipality. There is no guarantee in the future that the Fox Chapel region will develop as it has in the past. There is no legally binding regional plan.

B.

The second issue raised is whether Friday met his burden in establishing the unconstitutionality of Ordinance No. 319.

The Court has already dealt with this issue in the first part of its Opinion. The law is clear and precedent is set. Zoning ordinances cannot totally exclude multi-family dwellings from a municipality.

C.

The third argument advanced is that the zoning ordinance of Fox Chapel is not exclusionary. It is argued that it is not sufficient for the applicant to show or to argue that the zoning is exclusionary. He must also show that it is exclusionary as to his property.

Once again the appellees refer to the regional grouping of communities surrounding Fox Chapel. Fox Chapel was apparently intended to be the green haven for the region. Testimony stated that Fox Chapel is well planned for the use for which it was intended. However, this begs the real issue. Fox Chapel, itself, does exclude multi-family dwellings. The fact that neighboring municipalities do provide for multi-family dwellings is of little consequence. The appellees go further to distinguish the situations in Philadelphia which puts a population pressure on its suburban communities. It is acknowledged that no such pressure exists on the Fox Chapel region. However, in *Girsh*, *supra*, it was stated:

> "The simple fact that someone is anxious to build apartments is strong indication that the location of this

township is such that people are desirous of moving in, and we do not believe Nether Providence can close its doors to those people."

The question in the present case is not one of population pressure, but of rights. The right of an individual to use his land v. the right of the municipality to preserve what it conceives to be its character. The Court is not faced with the rights of the landowner. Rather, the rights of the municipality are before the Court. The Court is not saying that the landowner has a right to build an apartment house on the specific parcel of land he owns. As was mentioned above, the municipality can reasonably regulate the location, size, acreage, light-and-air, frontage, etc. of apartment houses. Likewise, the Court is not unmindful of its responsibility to the community, and does not take lightly its task of ruling upon a municipality's zoning ordinance. Aesthetic, scenic and ecological values are important. In this regard the Court is guided by the case of *National Land and Investment Co. v. Easttown Twp. Board of Adjustment*, 419 Pa. 504 (1965). Therein, the Court held that protecting the character — really the aesthetic nature — of the municipality is not sufficient justification for an exclusionary zoning technique.

In a footnote to the *Girsh* case, *supra*, the Court succinctly stated:

> "But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city."

D.

The issue raised by the Borough and by counsel for the Zoning Hearing Board is that the proposal of the applicant (Friday) would adversely affect the health, safety and welfare of the residents of Fox Chapel.

Many of the 226 Findings of Fact by the Zoning Hearing Board dealt with testimony charging that the proposed apartment building would have severe negative results on the community. Road conditions, traffic volume, soil erosion, possible ruptured gas lines, blind driveways, fire hazards were all reasons cited to exclude apartment buildings. The Findings of Fact were extensive, albeit, totally shaded to the positions taken by the Borough.

In situations where a municipality has totally banned a legitimate use of land, the applicant has met his burden of overcoming the presumption of constitutionality by showing the total ban, *Beaver Gasoline Co. v. Borough of Osborne*, 445 Pa. 571 (1971). Thereafter, if the municipality is to sustain the validity of the ban, it must present evidence to establish the public purpose served by the regulation.

The Court's review of the Zoning Hearing Board's Findings of Fact reveals that most of the findings adverse to the applicant are grounded upon objections to the apartment building at its particular proposed location. The remaining objections were general attacks on the apartment building as not fitting into the aesthetic setting of Fox Chapel. In relation to the municipalities' objections the Supreme Court has stated:

> "We therefore hold that neither aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners." *Medinger Appeal*, 377 Pa. 217 (1954)

III.

CONCLUSION

It is the opinion and holding of this Court that Fox Chapel Borough's Ordinance No. 319 is unconstitutional to

the extent that it provides for only single family dwellings and not for apartment buildings. This Court is not holding that a building permit must be issued to Friday. Nor does the Court hold that Friday is entitled to build an apartment building on his property. The Court is ordering Fox Chapel Borough to redesign its zoning ordinance to provide for apartment buildings. Apartment buildings themselves are not, *per se*, violative of the health, safety, morals or general welfare of the municipality.

Footnote No. 4 in the *Girsh* case, supra, indicates that planning and zoning, "in an ideal world," would be done on a regional basis. This Court heartily agrees. However, the present state of the law requires the Court to examine each challenge to the constitutionality of a zoning ordinance on a community to community basis. Each municipality in Pennsylvania is viewed as a separate and distinct unit, with leeway for the particular characteristics of the area.

Large-scale comprehensive planning which crosses municipal boundaries and encompasses whole geographical regions is an ideal for which, unfortunately, the legislature of our State has not provided mandatory legislation. What that leaves the Courts with is a case by case examination of each municipality. This is the only method approved by our appellate courts.

Therefore, the follwoing [sic]:

ORDER OF COURT

Watson, J.

And Now, to wit, this 9 day of September, 1976, It Is Hereby Ordered, Adjudged and Decreed:

1.) that Zoning Ordinance of 1971 (Ordinance No. 319) Borough of Fox Chapel is unconstitutional to the extent that it prohibits apartment building construction in the Borough of Fox Chapel;

2.) that the Borough of Fox Chapel take immediate steps to revise its zoning ordinances to provide for apartment buildings; and

3.) that the decision of the Zoning Hearing Board is reversed to the extent that it held Ordinance No. 319 to be constitutional.

OPINION

Watson, J.

This matter comes before the Court upon the Petition of John A. Friday, Jr., et ux, to modify the Opinion and Order of Court rendered by this Court on September 9, 1976 in the above-captioned case.

In the Opinion of September 9, 1976 the Court held that Zoning Ordinance No. 319 of the Borough of Fox Chapel was unconstitutional to the extent that it prohibits apartment building construction in the Borough of Fox Chapel. The Court further ordered the Borough of Fox Chapel to take immediate steps to revise its zoning ordinances to provide for apartment buildings. The Court also reversed the decision of the Zoning Hearing Board to the extent that it held Ordinance No. 319 to be constitutional.

The petitioner has requested the Court to modify its prior Order in four particulars: 1. vacate its direction to the Borough of Fox Chapel to revise its zoning ordinances to provide for apartment buildings; 2. to fully reverse the decision of the Zoning Hearing Board; 3. to direct the Borough of Fox Chapel to issue the petitioners a building permit for the petitioners' development plan upon compliance by the petitioners with valid building controls in effect on the date of the original application; 4. for the Court to retain jurisdiction over this case to ensure that the rights of the petitioners are not frustrated or denied.

The Borough of Fox Chapel also requests the Court to modify and/or vacate its prior Opinion and Order and hold Ordinance No. 319 to be constitutional.

The Court has reviewed the case law submitted to it and finds merit in the petitioners' requests. The Court finds that it may not order the municipality to amend its zoning ordinance, because amendment of a zoning ordinance is purely a legislative matter, *Ellick v. Board of Supervisors of Worcester Township*, ___ Pa. Comm. ___, 333 A.2d 239 (1975).

The Court should have gone further than merely invalidating the Borough's Ordinance No. 319. Definitive relief should have been granted. As the Pennsylvania Supreme Court stated in *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974):

> "Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief. To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable."

The Pennsylvania Commonwealth Court has placed a burden upon the lower courts. Once the lower court has concluded that the zoning ordinance unlawfully prohibits the landowner's proposed development, the landowner should be permitted to proceed with his proposed development, and the court below is required to retain jurisdiction during the pendency of further proceedings, and, upon motion of the landowner, to issue such supplementary orders as it deems necessary to protect the rights of the landowner, *Appeal of Olson*, ___ Pa. Comm. ___, 338 A.2d 748 (1975). The petitioner must comply with all administrative requirements of the zoning ordinance in effect on the date of the petitioner's original application which are not inconsistent with the present Opinion and Order, and the prior Opinion and Order of September 9, 1976.

Therefore, the following:

ORDER OF COURT

Watson, J.

AND NOW, to wit, this 11 day of January, 1977, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. that the Order of Court dated September 9, 1976 in the above-captioned case be vacated to the extent that it ordered the Borough of Fox Chapel to take immediate steps to revise its zoning ordinances to provide for apartment buildings;

2. that the Zoning Officer of the Borough of Fox Chapel issue a building permit to the petitioners for the petitioners' development plan upon compliance by the petitioners with valid building controls in effect on the date of the petitioners' original application for a building permit; and,

3. that this Court will retain jurisdiction over this matter to ensure that the prompt resolution of any future problems.

IN THE

Commonwealth Court of Pennsylvania

IN RE: Application of John A. Friday, Jr., Et Ux. Requesting Fox Chapel Borough Zoning Hearing Board To Hear Applicants' Challenges To The Fox Chapel Zoning Ordinance And Map And Make Findings Of Fact And Divisions Based Thereon Borough Of Fox Chapel, *Appellant*	**No. 158 C.D. 1977**
IN RE: Application of John A. Friday, Jr., Et Ux. Requesting Fox Chapel Borough Zoning Hearing Board To Hear Applicants' Challenges To The Fox Chapel Zoning Ordinance And Map And Make Findings Of Fact And Divisions Based Thereon William A. Jones, Katherine P. Jones, Harold H. Hammer And, Hannah R. Hammer, *Appellants*	**No. 303 C.D. 1977**

BEFORE:

HONORABLE JAMES S. BOWMAN, *President Judge*
HONORABLE JAMES C. CRUMLISH, JR., *Judge*
HONORABLE ROY WILKINSON, JR., *Judge*
HONORABLE THEODORE O. ROGERS, *Judge*
HONORABLE GENEVIEVE BLATT, *Judge*

ARGUED: November 2, 1977 — Pittsburgh

OPINION

OPINION BY JUDGE ROGERS Filed: January 9, 1978

The Borough of Fox Chapel has appealed an order of the Court of Common Pleas of Allegheny County reversing a decision of the Zoning Hearing Board of the Borough of Fox Chapel dismissing a challenge by John A. Friday, Jr. to the validity of the Borough's Zoning Ordinance of 1971. William A. Jones and Katherine P. Jones, his wife, and Harold H. Hammer and Hannah R. Hammer, his wife, who intervened below on the side of the Borough have also appealed.

The Borough Zoning Ordinance does not provide for multi-family dwelling use anywhere in the Borough. The only permitted residential use of land is for single family homes on one, two or three acre lots. Friday owns a 22.85 acre tract located in a Class A Residential District where the minimum lot size is three acres. Pursuant to Section 1004 (1) (a) of the Pennsylvania Municipalities Planning Code (MPC)[1], 53 P.S. §11004 (1) (a), Friday submitted a challenge to the constitutional validity of the use provisions of the Zoning Ordinance to the Zoning Hearing Board. The submission included plans for a single six-story, 215 unit apartment building proposed to be constructed on Friday's land. Friday later filed an amended plan for eleven three-story buildings containing a total of 121 units. During evidentiary hearings conducted by the Zoning Hearing Board, Friday further modified his plan by finally proposing to construct one five-story building containing 181 units. The Zoning Hearing Board made extensive findings of facts; concluded that the Zoning Ordinance was valid; and dismissed Friday's challenge.

Without taking additional evidence, the court below reversed the Zoning Hearing Board's order and held that the Zoning Ordinance was exclusionary and therefore unconstitutional. The court directed the Borough to enact curative amendments providing for apartment use. Friday filed a petition in the court below requesting a modification of its order, citing *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974). The court below properly vacated its first order in part and entered a second directing the Borough to issue a building permit to Friday upon his compliance with valid building controls in effect on the date of Friday's original application for a building permit. We affirm.

The Borough first says that because ordinances enjoy a presumption of validity, Friday had the burden of proving that the Fox Chapel Ordinance was not related to public health, safety and welfare. With this we agree. The Borough then says that Friday did not carry this burden by simply showing that the ordinance totally excluded apartment use. This proposition is clearly erroneous. When it is demonstrated that an ordinance entirely excludes a facially legitimate use, the presumption of validity is rebutted; and the municipality must then present evidence to establish that its regulation bears a relationship to the public health, safety and welfare. *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971). Friday's proposed apartment house is a legitimate use of land, absent the Zoning Ordinance; the Zoning Ordinance's failure to provide for this use is tantamount to its exclusion. *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970); *Dublin Properties v. Board of Commissioners of Upper Dublin Township*, 21 Pa. Commonwealth Ct. 54, 342 A.2d 821 (1975). Friday clearly met his burden of overcoming the presumption of the validity of the Fox Chapel ordinance.

The rule as to burdens enunciated in *Beaver Gasoline Co. v. Osborne Borough, supra*, has been applied in cases challenging the validity of zoning ordinances prohibiting

business uses[2] and those prohibiting various kinds of residential uses.[3] In *Girsh Appeal, supra*, Mr. Justice Roberts, with the apparent approval of three other justices, declared that a prohibition of apartment use has more critical implications than a prohibition of an industrial or commercial use because the former restricts the right of people to live on land, and further that municipalities "cannot have...zoning scheme[s] that make no reasonable provision for apartment uses." 437 Pa. at 243, 263 A.2d at 398.

The Borough says that it carried its burden of justifying its exclusion of apartment use by showing that apartments would cause an increase in population which would in turn place a strain on municipal services, cause congestion of its roads and do harm to the aesthetic nature of the Borough. Similar justifications were specifically rejected in *Girsh Appeal, supra*.

The Borough next contends that its ordinance is not exclusionary because the Borough is not located within the path of onrushing population expansion and that there is no demand or need for apartment uses within its boundaries. The argument was rejected in *Girsh Appeal, supra*, by the following phrases:

> "The simple fact that someone is anxious to build apartments is strong indication that the location of this [municipality] is such that people are desirous of moving in, and we do not believe [the municipality] can close its doors to those people." 437 Pa. at 245, 267 A.2d at 399.

The Borough says that Friday's site cannot support apartments without endangering the public health, safety and welfare because of soil conditions unsuitable for the proper disposition of sewage and subject to landslides. The Borough misapprehends its burden of proof. The suitability of Friday's site is not relevant to an inquiry into the constitutional validity of a municipality-wide prohibition of apartment uses. *See Girsh Appeal, supra* note 6, 437 Pa. at 246, 263 A.2d at 399. Site suitability is an appropriate consideration going to the type of relief, if any, that should be given to a landowner after he has successfully challenged an ordinance. *See Ellick v. Board of Supervisors of Worcester Township*, 17 Pa. Commonwealth Ct. 404, 333 A.2d 239 (1975).

The Borough next says that its membership in a regional planning effort cures the otherwise exclusionary and unconstitutional nature of its ordinance. In *Nicholas Heim & Kissinger v. Township of Harris*, Pa. Commonwealth Ct. , , 375 A.2d 1383, 1385 (1977), we addressed and rejected a similar argument made by a municipality in defense of a zoning ordinance excluding mobile homes:

> "The only defense of the zoning regulation which requires mention is one based on the Township's membership in a regional planning effort. Harris Township contends that this membership, together with an approved regional comprehensive plan, entitled it to credit for more substantial provision for mobile home parks by the zoning ordinances of the other members of the regional planning group. As we have said on a number of occasions, a comprehensive plan does not have the legal effect of a zoning ordinance; the former is recommendatory and only the latter is regulatory. Saenger v. Berks County, 9 Pa. Cmwlth. 499, 308 A.2d 175 (1973); Morelli v. Borough of St. Marys, 1 Pa. Cmwlth. 612, 275 A.2d 889 (1971). Obviously, Harris Township has no control over the future zoning practices of other municipalities in the region. The exclusionary zoning decisions hereinabove referred to and cited suggest that it might be a very good thing for the General Assembly to empower municipalities to enter into binding regional zoning arrangements. Some munici-

palities, by reason of size, present land use and physical conditions, are no doubt inappropriate places for every kind of residential use. If the regional zoning ordinance should provide the regions' 'fair share' of housing needs, each constituent municipality could then be developed in accordance with best planning principles applied purely and not with an eye to what might pass constitutional muster. However, there is now no such enabling legislation and regional comprehensive planning provides no justification for a municipality's exclusionary zoning practices."

Finally, we find no merit in the Borough's contention that the court below improperly usurped the Borough's legislative discretion by ordering that a building permit be issued to Friday. Section 1011 of the MPC, 53 P.S. §11011, authorizes courts to give just such relief upon a successful challenge of a regulation. *Ellick v. Board of Supervisors of Worcester Township, supra.*[4]

Order affirmed.

/s/ THEODORE O. ROGERS, J.
Theodore O. Rogers, J.

ORDER

AND NOW, this 9th day of January, 1978, the order of the Court of Common Pleas of Allegheny County made September 9, 1976 as modified by its order of January 11, 1977 is affirmed.

/s/ THEODORE O. ROGERS
Theodore O. Rogers, J.

FOOTNOTES

1. Act of July 31, 1968, P.L. 805, *as amended.*

2. *Beaver Gasoline Co. v. Osborne Borough, supra,* (prohibition of gasoline stations); *General Battery Corp. v. Zoning Hearing Board of Alsace Township,* 29 Pa. Commonwealth Ct. 498, 371 A.2d 1030 (1977), (prohibition of waste disposal plants).

3. *Waynesborough Corp. v. Easttown Township Zoning Hearing Board,* 23 Pa. Commonwealth Ct. 137, 350 A.2d 895 (1976), (prohibition of condominiums); *Appeal of Olson,* 19 Pa. Commonwealth Ct. 514, 338 A.2d 748 (1975); (prohibition of townhouses); *Ellick v. Board of Supervisors of Worcester Township,* 17 Pa. Commonwealth Ct. 404, 333 A.2d 239 (1975), (prohibition of townhouses); *Camp Hill Development Co., Inc. v. Zoning Board of Adjustment,* 13 Pa. Commonwealth Ct. 519, 319 A.2d 197 (1974), (prohibition of townhouses).

4. The Borough and the intervenors have additionally argued that the Court's order is unconstitutional as violating the separation of powers doctrine and as depriving Fox Chapel residents of property without due process. These contentions are clearly without merit.

IN THE

Supreme Court of Pennsylvania

WESTERN DISTRICT

IN RE: Application Of John A. Friday, Jr., Et Ux. Requesting Fox Chapel Borough Zoning Hearing Board To Hear Applicants' Challenges To The Fox Chapel Zoning Ordinance And Map And Make Findings Of Fact And Divisions Based Thereon.	**No. 1514 Allocatur Docket**

APPEAL OF BOROUGH OF FOX CHAPEL, JONES, ET AL.

ORDER

PETITION DENIED this 21st day of July, 1978.

Per Curiam

IN THE

Commonwealth Court of Pennsylvania

IN RE: Application Of John A. Friday, Jr. Et Ux., Requesting Fox Chapel Borough Zoning Hearing Board To Hear Applicants' Challenges To The Fox Chapel Zoning Ordinance And Map And Make Findings Of Fact And Divisions Based Thereon	**Nos. 158 and 303 Commonwealth Docket 1977**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Borough of Fox Chapel, William A. Jones, Katherine P. Jones, Harold H. Hammer, and Hannah R. Hammer, the appellants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania denying appellants' Petition for Allowance of Appeal from Commonwealth Court of Pennsylvania entered in this case on July 21, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ A. BRUCE BOWDEN
A. Bruce Bowden

/s/ LARRY E. COPLOFF
Larry E. Coploff

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Filed: September 25, 1978